MALAYSIA BUILDING SOCIETY BHD A

v.

SONG AH TU

HIGH COURT MALAYA, ALOR SETAR B
SOFIAN ABD RAZAK JC
[CIVIL SUIT NO: 22-07-2003]
30 APRIL 2007

CIVIL PROCEDURE: *Striking out - Rules of the High Court 1980, O. 18 r. 19 - Claim by plaintiff against defendant as guarantor - Application to strike out plaintiff's claim on grounds of time bar - Whether plain and obvious case for plaintiff's claim to be struck off - Whether plaintiff's claim scandalous, frivolous or vexatious - Whether defendant's defences are unarguable - Limitation Act 1953, s. 6(1)* C

D

BANKING: *Securities for advances - Continuing guarantee given to secure bridging loan - Whether liability of guarantor is a continuing liability*

CONTRACT: *Guarantee - Continuing guarantee - Whether liability of guarantor is a continuing liability - Whether lender entitled to claim against guarantor at any time - Whether guarantor can raise limitation as a defence* E

The defendant signed a Deed of Guarantee and Indemnity in consideration of the plaintiff agreeing to grant a bridging loan of RM5 million ('said bridging loan') to Silver Joy Development Sdn Bhd ("the borrower"). The borrower defaulted in repayment of the said bridging F loan and was wound-up. Therefore, the plaintiff in this suit claimed against the defendant the sum of RM13,915.176.12 with interest and cost. The defendant *inter alia* argued that the plaintiff's claim was statute barred pursuant to the Limitation Act, 1953. The counsel for the plaintiff submitted that in accordance with the terms and conditions of G the Deed of Guarantee and Indemnity, the liability of the defendant was a continuing liability and with the signing of the Deed of Guarantee and Indemnity, the defendant was bound by its terms and conditions whereby the plaintiff could take action against the defendant at any time. The defendant applied pursuant to O. 18 r. 19(1), (b) or (c) of the H Rules of the High Court 1980 (RHC) to strike out the plaintiff's Amended Writ and Statement of Claim. The learned Senior Assistant Registrar allowed the defendant's application and hence this appeal by the plaintiff.

I

Held (allowing the Plaintiff's appeal with costs):

(1) In order for the defendant to succeed for an order under O. 18 r. 19(1) of the RHC, he must satisfy the court that the plaintiff's claim is plainly and obviously hopeless and scandalous, frivolous or vexatious where the defences are unarguable. 'Scandalous' is taken to mean 'wholly unnecessary and irrelevant' and not merely unpleasant allegations. The word 'frivolous or vexatious' means 'obviously unsustainable'. (paras 25, 29 & 30)

(2) The plaintiff was entitled to claim against the defendant as a Guarantor at any time and the liability was continuing and it had never been discharged. The defendant had bound himself not to raise limitation as a defence to an action to enforce the contract. The defendant ought not to be permitted to go back on his word. (para 32)

(3) The court was unable to find any merits in the application by the defendant in encl. 50 to strike out the plaintiff's claim. On the facts it was not a 'plain and obvious' case for the court to exercise its judicial discretion under O. 18 r. 19(1)(b)(c) and (d). (para 33)

Case(s) referred to:

Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 FC ***(refd)***

Boey Oi Teng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Gabriel Peter & Partners v. Wee Chang Jin [1998] 1 SLR 374 ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Nik Che Kok v. Public Bank Berhad [2001] 2 CLJ 157 CA ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1995] 3 CLJ 26 CA ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Order [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong [2006] 7 CLJ 541 HC ***(refd)***

The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1), (i)(a)

Rules of the High Court 1980, O. 18 rr. 19(1)(b), (c)

For the plaintif - Chuah Chong Ewe; M/s Syarikat Ng & Anuar

For the defendant - BP Ang; M/s BP Ang & Tan

Reported by Amutha Suppayah

JUDGMENT

Sofian Abd Razak JC:

[1] Enclosure 50 is an application made by the defendant pursuant to O. 18 r. 19(1)(b) or (c) of the Rules of the High Court 1980 (RHC) whereby the defendant seeks to strike out the plaintiff's amended writ and statement of claim dated 29 February 2004 on the grounds that the pleadings are scandalous, frivolous, vexatious or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court.

[2] The defendant's application is premised on the following grounds, namely:

(i) that the plaintiff's claim is scandalous, frivolous and vexatious;

(ii) it may prejudice, embarrass or delay the fair trial of the action;

(iii) that the plaintiff's claim is otherwise an abuse of the process of the court.

Factual Background

[3] In the amended statement of claim the plaintiff pleaded that:

(i) the plaintiff is a company incorporated in Malaysia with a registered address at 11th Floor, Wisma MBSB, No: 48, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur;

(ii) the defendant was at all material time a guarantor with an address at No: 1270 Berapit Village, Bukit Mertajam, Pulau Pinang or at No: 6461, Jalan Ayam Didik 3, Kawasan Perindustrian Ringan, Taman Ria Jaya, 08000 Sungai Petani;

(iii) by letter dated 11 November 1998, (hereinafter called 'the letter of offer') signed between the plaintiff and the the defendant, the plaintiff granted to Silver Joy Development Sdn Bhd a bridging loan of RM5 million (hereinafter called the 'said bridging loan') subject to the terms and conditions as contained in the letter of offer and the loan agreement.

(iv) Pursuant hereto, the defendant together with one Ang Chaing Boon and Mohamad Ronnie Koay bin Abdullah jointly and severely signed a deed of guarantee and indemnity dated 19 July 1994 in consideration of the plaintiff agreeing to grant the loan to Silver Joy Development Sdn Bhd subject to the terms and conditions therein contained. (Hereinafter called the Borrower).

(v) The borrower had failed to observe the terms and conditions of the bridging loan agreement and as at 23 October 2002, had defaulted in its repayment in the sum of RM13,915,176.12.

(vi) The borrower had been wound-up *vide* Winding-up Petition No: 28-1-98.

(vii) The plaintiff's solicitor's had on 23 October 2002 written to the defendant Ang Chaing Boon and Mohamad Ronnie Koay bin Abdullah for the payment of RM13,915.176.12.

(viii) Ang Chaing Boon had been adjudged a bankrupt on 4 March 1998.

(ix) Mohamad Ronnie Koay bin Abdullah had been adjudged a bankrupt on 23 June 1998.

[4] The relief sought by the plaintiff in his statement of claim against the defendant jointly or separately.

(a) the sum of RM13,915.176.12 as at 23 October 2002.

(b) interest at the rate of 9.5% per annum from 24 October 2002 till full realization.

(c) cost.

(d) any other relief deemed fit by the Honourable Court.

[5] In the amended defence dated 4 July 2005, the defendant avers *inter alia* as follows:

(i) that the defendant denied having any knowledge of bridging loan agreement dated 19 July 1994 signed between the plaintiff and the Borrower. Alternatively, if there were such an agreement, it was void and unenforceable because the purported attorney for the Borrower had no authority to sign the said agreement.

(ii) that the release of the money by the plaintiff to the Borrower was wrongful as it did not comply with the condition for its released.

(iii) that the plaintiff's claim is statute barred pursuant to the Limitation Act, 1953.

[6] The said application, encl. 50 was fixed for hearing on 18 July 2006 and the learned Senior Assistant Registrar after reading the affidavits and written submissions filed by both parties allowed the defendant's application to strike out the plaintiff's writ and statement of claim with costs.

[7] Hence, the plaintiff who was dissatisfied with the said decision filed this notice of appeal to judge in chambers on 12 July 2006.

[8] Both the counsel for the plaintiff and the defendant informed the court that for purposes of this appeal, they would adopt and rely on the written submissions (encls. 55, 57 and 59 bundle of authorities) filed in respect encl. 50 before the learned Senior Assistant Registrar.

[9] For this purpose, the defendant's counsel had filed the following documents:

(i) Bundle of authority (encl. 54)

(ii) Written submission (encl. 55)

(iii) Additional bundle of authority (encl. 58)

(iv) Written submission in reply (encl. 59)

[10] The plaintiff's counsel had filed the following documents:

(i) Bundle of authority (encl. 56)

(ii) Written submission (encl. 57)

Defendant's Submission

[11] The defendant described the relationship between the plaintiff, the borrower and the defendant as contractual. In accordance with s. 6(1) of the Limitation Act 1953, action should not be brought after the expiration of six years from the date on which the cause of action accrued.

[12] The counsel for the defendant referred to cl. 2 of the loan agreement and argued that the defendant's liability to pay accrued upon the expiry of the 14 day period as stipulated in the defendant's exh. 'SAT-1'. Exhibit 'SAT-1' was the letter of demand dated 5 October 1996 sent to the defendant. According to the defendant, the cause of action ought to have been filed on or before 19 October 2002. In this case, the plaintiff had only filed the writ and statement of claim on 14 January 2003, and therefore it was statute barred.

[13] The defendant's counsel referred to the case of *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 where the Supreme Court as follows:

> The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under clause 1, the guarantors are to pay 'on demand ... . Since bank guarantees

> invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor ....

[14] The defendant's counsel further refer to the case of *Nik Che Kok @ Nik Soo Kok v. Public Bank Berhad* [2001] 2 MLJ 328 where the Court of Appeal held as follows:

> The liability of the principal debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. There is no general rule that a notice of demand must specifically mention the precise amount owing. A demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. For the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest time the respondent could have commenced a suit was on after issuing the notice of demand of 2 April 1986. Since the suit was filed more than six years after the cause of action accrued, the suit was stature barred by virtue of section 6(1(a) of the Limitation Act 1953 (see page 331A-C).

[15] On the issue of continuing liabilities, the defendant's counsel submitted that, the defendant's liability arose after the expiry of the 14 days period as stipulated in the notice of demand. There was no agreement to extend the limitation period in reference to the payment of the outstanding sum due and owing to the plaintiff. The cause of action accrued as soon as the 14 days period expired. The plaintiff should not interprete that the defendant's obligation to pay the plaintiff as a continuing liability because if it was so, the cause of action will never accrue and will defer to time which is uncertain. Reference was made to the case of *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717 where as p. 724 para C, the court held: Section 6(i)(a) of the Act provides that "action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

[16] The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action pounded on contract accrues on the date of its breach and that time begins to run from that breach.

Submissions By The Plaintiff

[17] The counsel for the plaintiff submitted that in accordance with the terms and conditions of the deed of guarantee and indemnity dated 19 July 1994 the liability of the defendant was a continuing liability. With the signing of the deed of guarantee and indemnity, the defendant was

bound by its terms and conditions whereby the plaintiff could take action against the defendant at any time. The plaintiff's counsel referred to the relevant clauses in Deed of Guarantee and Indemnity namely:

Clause 3 Guarantor's Covenants

3.2 that the liability of the guarantors under the guarantee and indemnity herein shall subsist whether or not MBSB has a legal right to claim against the Borrower or any other surety or against any security which MBSB may now or at any time hereafter or from time to time have from or against the Borrower or any other person for any sums, loss or damage or whether or not MBSB has availed itself of its legal remedies against the Borrower or any other surety or against any security as aforesaid;

3.8 that the guarantee and indemnity shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum or sums of money owing as aforesaid but shall be continuing security and shall extend to cover any sum or sums of moneys which shall for the time being constitute the balance due from the Borrower to MBSB upon any such account or accounts as herein mentioned;

3.9 that the guarantee and indemnity of the guarantors herein shall be a continuing guarantee and security for all monies whatsoever now or hereafter from time to time owing to MBSB by the Borrower whether alone or jointly and severally with another or others and whether as principle or surety notwithstanding that the Borrower may at any time or times cease to be indebted to MBSB for any period or periods and notwithstanding any settlement of account or accounts or otherwise;

3.11 that all sums of monies not recovered or recoverable from the guarantors or any of them on the basic of a guarantee whether by reason of any legal limitation, disability or incapacity on or of the Borrower or any other fact and circumstances and, whether known or not to MBSB shall nevertheless be recoverable from the guarantors or any of them as principle debtors in respect hereof and shall be repaid by the guarantors and each of them upon demand made by MBSB or on MBSB's behalf;

3.21 that MBSB shall be entitled to recover from the guarantors or any of them, all sums payable by the guarantors hereunder without first availing itself or themselves of its or their legal remedies against the Borrower or any other surety or against any security MBSB may now or at any time hereafter or from time to time have from or against the Borrower or any other persons; and

Indemnity Clause

> 6. As a separate, additional and continuing obligation, the guarantors inconditionally and irrevocably undertake with MBSB that, should the indebtedness amounts not be recoverable from the guarantors under cl. 2 for any reason whatsoever (including, but without prejudice to the generality of the foregoing by reason of any provision of the loan agreement being or becoming void, unenforceable or otherwise invalid under any applicable law) then, notwithstanding that may have been known to MBSB, each of the guarantors will, as a sole, original and independent obligor, upon first written demand by MBSB under cl. 2, make payment of the indebtedness by way of full indemnity in such manner as is provided for in the loan agreement.

The counsel for the plaintiff further submitted that based on the case of *Sia Siew Hong v. Lim Gim Chian* [1995] 3 MLJ the court held at pp. 151 and 152 as follows:

> As a general rule, in action for breach of contract, time under the Limitation Act, 1953 begins to run from the date of its breach. *Nasri v. Mesah* [1971] 1 MLJ 32 is authority for that proposition ....
>
> that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise from the earliest time at which an action could be brought.

[19] But it must always be borne in mind that the question as to when a cause of action arises in relation to the breach of a contract is one that depends for its determination upon the construction of a particular contract. Thus, it may be inappropriate to apply the general rule laid down in *Nasri v. Mesah (supra)* where the breach complained is a continuing one or where the complaint relates to the breach of certain contracts of indemnity.

[20] The court in *Sia Siew Hong*'s case *(supra)* construed the document when read as a whole as an indemnity rather than a guarantee. It was described a guarantee in the final clause whereby the appellants agreed that the respondents may enforce the 'guarantee' at any time.

[21] The plaintiff further submitted that the principle is that the general rule governing the limitation for breach of contract may be displaced by a contrary intention evinced by the parties in a particular case.

[22] The counsel for the plaintiff also submitted that in the case before the court, there is a similar clause as found in the case of *Sia Siew Hong (supra)* that is in cl. 3.2.

[23] In *Sia Siew Hong*'s case at p. 155, Gopal Sri Ram JCA described the final clause in the document whereby the appellant agreed that the respondent may enforce the 'guarantee' at any time. His Lordship further described the said clause as follows 'That appears to me to be a promise for value by which the appellants bound themselves not to raise limitation as a defence to an action brought to enforce the contract. In such circumstances, it seems quite plain that the appellants might not to be permitted to go back on their word. It would be quite unjust and inequitable to permit them to do so.'

[24] On the issue of whether the plaintiff's writ and statement of claim ought to be struck out, the plaintiff's counsel submitted that the case before the court was not a case where on the facts is not a case of plain and obvious where the court ought to exercise its discretion to strike-out the writ and statement of claim.

Principles For Striking Out

[25] In order for the defendant to succeed for an order under O. 18 r. 19(1) of the RHC, he must satisfy the court that the plaintiff's Claim is plainly and obviously hopeless and scandalous, frivolous or vexatious where the defences are unarguable.

[26] The Supreme Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Order* [1985] 2 MLJ 385 at p. 386 held:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under Order 18 r. 19 of the Rules of the High Court 1980; the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable.'

[27] This view was adopted by the Federal Court in the case of *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7:

> The principle upon which he Courts act in exercising its power under any of he four (4) limbs of Order 18 rule 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable.

A **Order 18 r. 19(1)(b) And (d)**

[28] Under O. 18 r. 19(1)(b) and (d) of the RHC, the court may at any stage of the proceeding order to be struck out any writ and statement of claim in the action on the ground that (b) It is scandalous, frivolous or vexatious; or (d) it is otherwise an abuse of the process of the court.

[29] From the plethora of authorities pertaining to the question of what amounts to 'scandalous,' it is taken to mean 'wholly unnecessary and irrelevant' and not merely unpleasant allegations. The cases which discussed the meaning of 'scandalous' are *Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong @ Teh Hong Jet* [2006] 7 CLJ 541 and *Boey Oi Teng t/a Indah Reka Construction & Trading v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405.

[30] The words 'frivolous or vexatious' on the other hand, mean 'obviously unsustainable' (see *Technointan Holding Sdn Bhd v. Tetuan Tan Kim & Teh Hong Jet (supra)*.

[31] As to the meaning of 'an abuse of the process of the court' reference is made to the case of *Gabriel Peter & Partners (suing as a firm) v. Wee Chang Jin* [1998] 1 SLR 374 at p. 384:

> The term 'abuse of the process of the Court', in Order 18 rule 19(1)(d), has been given a wide interpretation by the Courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the Court must be used *bona fide* and properly and must not be abused. The Court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of Process is the bringing of an action for a collateral purpose ... if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the Court.

Decision Of The Court

[32] On the above consideration the court is satisfied that upon the true construction of the clauses in the Deed of Guarantee and Indemnity dated 19 July 1994 in particular cl. 3.2, the plaintiff was entitled to claim against the defendant as a guarantor at any time and the liability is continuing and it has never been discharged. The court is also of the

view that the defendant has bound himself not to raise limitation as a defence to an action to enforce the contract. The defendant ought not to be permitted to go back on his word. It would be quite unjust and inequitable to permit him to do so. (see the case of *Sia Siew Hong & Ors v. Lim Gim Chian & Anor (supra)*.

[33] The court is unable to find any merits in the application by the defendant in encl. 50 to strike out the plaintiff's claim. On the facts it is not a 'plain and obvious' case for the court to exercise its judicial discretion under O. 18 r. 19(1)(b)(c) and (d). I therefore allowed the plaintiff's appeal (encl. 59) with costs.